Filed 1/7/13 In re Tomas M. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TOMAS M., a Person Coming Under the Juvenile Court Law.	B238935 (Los Angeles County Super. Ct. No. FJ49876)
THE PEOPLE, Plaintiff and Respondent, v. TOMAS M., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia Loo, Juvenile Court Referee. Affirmed as modified and remanded with directions.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.

After the juvenile court denied minor Tomas M.'s motion to suppress evidence under Welfare and Institutions Code section 700.1, minor admitted that he had committed the crime of possession of a firearm by a minor, a felony (Pen. Code, § 29610). The juvenile court sustained the petition alleging this offense and declared minor a ward of the court pursuant to Welfare and Institutions Code section 602. The juvenile court ordered minor to undergo a midterm camp program and listed minor's terms and conditions of probation, which included tattoo removal. The juvenile court set the maximum period of confinement at three years and granted minor predisposition credit of 33 days.[1]

Minor appeals on the grounds that: (1) the juvenile court erred in denying his motion to suppress evidence; and (2) the juvenile court abused its discretion in imposing a probation condition requiring minor to remove his tattoos.

FACTS

Prosecution Evidence

During the afternoon of January 2, 2012, Los Angeles Police Department Officer Justin Howarth was assigned to the Rampart gang enforcement detail. As part of his duties, Officer Howarth tracked gang membership, monikers, crimes and rivalries. He reviewed arrest reports for gang-related arrests, and he conducted probation and parole compliance checks in the area. On that day, he and his partner were parked at a 7-Eleven store in a marked black-and-white police car at the corner of Santa Monica Boulevard and Virgil Avenue. Officer Howarth was assigned to that geographical area because it was claimed by La Mirada Locos, which was the primary gang that Officer Howarth monitored.

As Officer Howarth caught up on his paperwork, he observed minor walking toward the passenger side of the patrol car where the officer was seated. He first spotted

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[1] The minute order erroneously states that minor has 31 days of predisposition credit.

minor at a distance of about 75 feet. Officer Howarth recognized minor from previous contacts.[2] Officer Howarth knew minor was a gang member from speaking with other gang members. He knew minor had a large tattoo on his chest of the letters "L.M.," which stand for La Mirada.

Officer Howarth had eye contact with minor as minor approached the patrol car. When minor was at a distance of approximately 20 feet, he made a furtive movement to his waistband and grabbed a bulky object. The object was under minor's clothing and it resembled a gun in shape. Based on his training and experience, Officer Howarth believed minor was reaching for a weapon in order to draw it out. Officer Howarth and his partner communicated this belief to each other and rapidly got out of the patrol car, drawing their weapons. Officer Howarth was in a heightened state of awareness due to recent shootings involving the La Mirada gang. He knew there were "outstanding guns" in the neighborhood. In addition to believing minor had a gun on him, the officer believed minor was closing distance with the police car with the intent of engaging in a gun fight with him and his partner.

When the officers jumped out of their car, minor made a 45-degree turn away from the officers and toward the 7-Eleven entrance. Officer Howarth gave minor commands to turn around and put his hands behind his head. Minor kept walking toward the entrance and ignored the officer's commands. When minor got to the entrance he complied. Officer Howarth conducted a brief patdown search on minor's front and rear waistband and did not feel any objects. Because of the people coming in and out of the store, he walked minor to the police car for safety purposes. Officer Howarth continued the patdown, heard a metallic "clink" sound, and saw a revolver fall out of minor's right

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[2] On one occasion, a warrant check revealed minor was a missing person, and the officer returned him to his parents' house and spoke to his mother. On another occasion, Officer Howarth detained minor for smoking marijuana.

pant leg. Officer Howarth did not know whether his partner had his gun drawn while Officer Howarth walked minor to the police car in handcuffs.

DISCUSSION

I. Validity of Search

A. Minor's Argument

Minor contends that the People failed to establish objectively specific, articulable facts upon which to find Officer Howarth's initial detention of minor reasonable. Therefore, since the initial detention was illegal, the court erred in not suppressing the results of the subsequent patdown search.

B. Relevant Authority

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) "In *United States v. Sokolow* (1989) 490 U.S. 1, 7, the high court reiterated its view that the 'reasonable suspicion' necessary to justify a brief, investigative detention is a level of suspicion that is 'obviously less demanding than that for probable cause' and can be established by 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" (*Id.* at p. 230; see also *People v. Dolly* (2007) 40 Cal.4th 458, 463.)

In ruling on a motion to suppress evidence, "the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law,

viz., the reasonableness of the challenged police conduct, is also subject to independent review. [Citations.] The reason is plain: 'it is "the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.'" [Citation.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

C. Proceedings Below

After hearing testimony and argument on the suppression motion, the trial court recessed to research the cases suggested by counsel. The trial court subsequently ruled that the officers' acts of handcuffing minor and moving him away from the door of the 7-Eleven toward the police car were reasonable, and these acts did not elevate the detention of minor to an arrest. The trial court found the officers' actions were justified, and it denied the motion to suppress.

D. Motion Properly Denied

We conclude that substantial evidence supports the trial court's factual determinations. The trial court has the power to decide "what the officer actually perceived, or knew, or believed, and what action he took in response." (*People v. Leyba* (1981) 29 Cal.3d 591, 596.) The trial court clearly credited the officer's version of disputed facts. The issue of the witness's credibility is a matter for the trial court that we will not disturb on appeal. (*People v. James* (1977) 19 Cal.3d 99, 107.) The evidence of a single credible witness is sufficient to prove a fact unless corroboration is required by statute. (*DeMiglio v. Mashore* (1992) 4 Cal.App.4th 1260, 1270; Evid. Code, § 411.)

In addition, under the totality of the circumstances, the factual record supports the trial court's conclusions that police action met the constitutional standard of reasonableness (*People v. Williams, supra*, 45 Cal.3d at p. 1301), and Officer Howarth and his partner were justified in detaining minor and conducting a patdown search. In *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*), the United States Supreme Court upheld temporary detention for less than probable cause, and "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he

has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (*Id*. at p. 27.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citations.]" (*Ibid*.) Here, minor compounded his furtive movement toward a bulky, gun-shaped object with evasive behavior. "Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*In re H.M.* (2008) 167 Cal.App.4th 136, 144, citing *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.)

In addition, Officer Howarth knew minor to be a gang member—one who wore his gang initials writ large on his chest. "We cannot overlook the reality that in the 40 years since *Terry* was decided, the problem of criminal street gangs has escalated. It is common knowledge that in Los Angeles, gangs have proliferated and gang violence is rampant. [Citation.] . . . [¶] It is likewise common knowledge that members of criminal street gangs often carry guns and other weapons. . . . 'No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them.' [Citations.]" (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 146.) The fact that the officers were stopped in the La Mirada gang's territory strengthens the grounds for their suspicion. The location of an encounter, although not enough to establish reasonable suspicion, may be sufficient when combined with other information available to the officer at the time of the detention. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124.) "[T]hat an area involves increased gang activity may be considered if it is relevant to an officer's belief the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may." (*People v. King* (1989) 216 Cal.App.3d 1237, 1241.)

Our decision also takes into account the officer's training and experience in evaluating particular situations. (*United States v. Cortez* (1981) 449 U.S. 411, 418.) Officer Howarth was a gang officer assigned to minor's gang and had been assigned to

that duty for two years at the time of the hearing. Upon seeing the object in minor's waistband, a patdown search was undeniably proper, since, as occurred in *Terry*, "nothing in the initial stages of the encounter serve[d] to dispel his reasonable fear for his own or others' safety." (*Terry*, *supra*, 392 U.S. at p. 30.) "Circumstances and conduct which would not excite the suspicion of the man on the street might be highly significant to an officer who had had extensive training and experience . . . ." (*People v. Superior Court of Yolo County* (1970) 3 Cal.3d 807, 827.) "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal. . . ." (*In re Tony C.* (1978) 21 Cal.3d 888, 894.)

As aptly stated in *In re H.M.*, """we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol." [Citation.]' [Citations.]" (167 Cal.App.4th at p. 147.) And, "'[f]ailure to cursorily search suspects for weapons in a confrontation situation in an area where gang activity and weapon usage is known from the officers' past experience would be most careless.' [Citation.] Officers are not required to take unnecessary risks in the performance of their duties. [Citation.] When an officer observes conduct giving rise to a reasonable suspicion an individual is involved in criminal activity, and that activity occurs in an area known for recent, violent gang crime, these facts together go a long way toward establishing reasonable suspicion the individual is armed." (*Ibid.*)

Exercising our independent judgment, we agree with the trial court's decision to deny minor's motion to suppress.

II. Probation Condition

A. Minor's Argument

Minor contends the imposition of mandatory tattoo removal as a probation condition was an abuse of discretion and unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).

B. Relevant Authority

Welfare and Institutions Code section 730, subdivision (b), provides in pertinent part: "When a ward . . . is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward. . . . The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." The juvenile court thus enjoys broad discretion to impose conditions of probation that will serve to rehabilitate the minor. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) That discretion will not be disturbed on appeal in the absence of manifest abuse. (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.)

"A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent*, *supra*, 15 Cal.3d 481, 486, fn. omitted.) All three factors must be present for a condition of probation to be invalid. (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242 [applying the *Lent* factors to a juvenile proceeding].) Even though conditions that infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of a juvenile offender (*In re Josh W.*, *supra*, 55 Cal.App.4th at p. 5), a trial court's discretion

in setting the terms and conditions of probation is not unlimited. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; *In re Frank V.*, *supra*, at p. 1242.)

C. Proceedings Below

During her argument regarding the proper disposition for minor, defense counsel stated, "he is willing at this point to do anything that the court asks of him to return to his mother's home, to participate in all of these services, to turn his life around, and to get away from gang life. We have even discussed tattoo removal, and I advised him that I believe Home Boy Industries still offers it, and if not we could provide him with a referral for tattoo removal."

The juvenile court stated that its biggest concern was that minor had a loaded gun while involved in a gang. The court said that it would feel better if the gang association were minimal, but it was troubled by the loyalty minor demonstrated to his gang by the tattoo of L.M. for La Mirada Locos. Among its probation conditions, the juvenile court ordered tattoo removal. Defense counsel objected to that condition absent minor's consent and believed the condition to be unconstitutional.

D. Probation Conditions Must Be Modified

We believe the probation conditions must be modified to eliminate the requirement of tattoo removal. Although in the abstract the condition may not meet all three of the *Lent* criteria, other concerns dictate in the instant case.

It is true that the testimony of Officer Howarth indicated that the large "L.M." on minor's chest referred to his gang, La Mirada Locos. It is also true that probation conditions prohibiting minors from acquiring tattoos have been found to pass muster under the *Lent* criteria in cases where minors' crimes were found to be connected to their gang affiliation. (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 929; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1035.) Arguably, the condition in the instant case is akin to a condition prohibiting the application of tattoos, given minor's crime and gang affiliation and the apparent connection between the two. We conclude, however, that the *Lent* analysis does not resolve the issue before us.

As noted *ante*, minor was made a ward of the court under Welfare and Institutions Code section 602. Therefore, the juvenile court stands in the shoes of minor's parents. (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941; *In re Frank V.*, *supra*, 233 Cal.App.3d at p. 1243.) The duties and rights of parents are subject to limitation "'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.' [Citation.]" (*In re Roger S.* (1977) 19 Cal.3d 921, 928.) The state, whose rights with respect to the child are more circumscribed than those of the parent, must a fortiori be limited by an act that would jeopardize the health or safety of the child. (*Ibid*.) Indeed, one of the purposes of the juvenile court law is to provide for the protection and safety of the minor. [Citation.] (Welf. & Inst. Code, § 202, subd. (a); *In re Binh L.* (1992) 5 Cal.App.4th 194, 204.)

We believe that the removal of a tattoo of a permanent nature, as minor's appears to be, would impose a painful and difficult requirement upon minor that is unjustified under the circumstances presented. Were tattoo removal a simple procedure, it would arguably be reasonable under *Lent*, just as conditions of probation forbidding the acquisition of new tattoos have been found reasonable. Tattoo removal is, however, more complicated and expensive than the application of a tattoo. (Mayo Clinic Staff, Tattoo Removal (March 10, 2012) <http://www.mayoclinic.com/health/tattoo-removal/MYO1066> [as of Dec. 13, 2012].) The removal procedure initially may result in swelling, blistering, or bleeding as well as pain. Even after this difficult process, it may not be possible to completely erase the tattoo. (*Ibid*.) Removal is likely to result in scarring, and infection and skin discoloration are also possible. (*Ibid*.; see also *People v. Page* (1980) 104 Cal.App.3d 569, 578 [removal of permanent tattoos results in scarring for life].) In light of these potential consequences, the juvenile court abused its discretion in ordering minor to have his tattoo or tattoos removed.

We therefore modify minor's probation conditions to delete the directive that minor subject himself to tattoo removal. Minor should be permitted to be screened for tattoo removal services, should he choose to undergo the procedure, an action his counsel

stated he was considering during the disposition hearing.[3] As noted, the banning of new tattoos as a condition of probation has been upheld, and the juvenile court may consider imposing this condition.

DISPOSITION

The judgment is modified to delete the probation condition requiring minor to have his tattoos removed. The matter is remanded to the juvenile court to consider imposing a ban on minor's acquiring new tattoos and ordering that tattoo removal services be made available to minor. In all other respects, the judgment is affirmed. The juvenile court is directed to amend the dispositional minute order to reflect that minor has 33 days of precommitment custody credits.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ

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3 Welfare and Institutions Code section 1915, added in 1997, provides for a tattoo removal program administered by the Youth Authority, although not all types of tattoos qualify for removal.